UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS SBOARD

COLUMBIA SUSSEX,

Employer **CASE 19-RD-223516**

and

PATRICK M. WHITE,

Petitioner

and

UNITE HERE! LOCAL 878,

Union

UNION'S RESPONSE IN OPPOSITION TO REQUEST FOR REVIEW OF ORDER

UNITE HERE! Local 878 ("the Union") hereby respectfully files this opposition to Columbia Sussex's ("the Hilton" or "the Hotel") Request for Review of the Regional Director Ronald K. Hooks' July 18, 2018 decision to postpone processing a decertification petition pending completion of investigation and resolution of unfair labor practices filed by the Union.

Contrary to the Hotel's entirely disingenuous assertions to this Board, the facts show that the Employer's pervasively bad course of conduct—particularly over the past 18 months through the present unaddressed unfair labor practice ("ULP") charges that are currently pending—clearly undermines the Hotel's position in its Request for Review that its behavior has *not* "interfere[d] with employees' free choice" and that none of the current ULPs—which include *retaliatory terminations* for protected concerted activity—are "otherwise sufficient bases for blocking." Because the Hotel does not have any justification for its horrific course of conduct

(other than its dislike of the Union), the Hotel hollowly asserts that this case is justification to overturn the long-standing case law permitting the Region to at least postpone a decertification petition until underlying ULPs are remedied. The Board should not take the Employer up on such an absurd request.

Relying on a substantial body of case law, the Regional Director correctly determined that the decertification petition should be stayed pending the handling of the various ULPs at issue here. The Hotel's argument to the contrary is full of sound and fury but signifies nothing, ignores crucial components of case law, and ultimately must be set aside.[1]

Thus, as we demonstrate in the remainder of this brief, there is no basis whatsoever for granting the Hotel's request for review. As the Hotel's Request raises no substantial issues warranting review, it should be denied outright.

STATEMENT OF FACTS

The Union represents a bargaining unit of approximately 150 employees at the Hotel in Anchorage, Alaska. The bargaining unit is comprised of employees ranging from restaurant wait staff, maintenance employees, housekeepers, and other positions that keep the Hotel operational.

There is lengthy history surrounding the parties' attempts to bargain a successor agreement to the CBA that expired in 2009. The repeated violations of the Act committed by the Employer—ranging from surveillance and retaliation to failure to bargain in good faith and failure to provide information—are supported by numerous merit findings issued by the Region.

[1] As explained herein, the Union's position is that the decertification petition is fundamentally tainted and that no decertification election should *ever* be held based on *that* showing of interest—we are not merely contending that the election should be deferred until after the ULPs have been remedied. However, as the Hotel's petition is challenging the Region's decision to *postpone* the election—which is inherently reasonable—we address both circumstances throughout this brief.

The Hotel has also undergone incredible efforts to undermine the relationship between the Union and the bargaining unit and prevent the Union from being able to properly represent its members, thus making a decertification vote at this time particularly inappropriate. Focusing on the most recent parts of the Hotel's bad behavior, it is apparent that the Hilton has persistently refused to bargain in good faith with the Union, thus making it appear useless to members of the bargaining unit. It is no surprise that, under such circumstances, some members of the bargaining unit might sign cards indicating that they no longer wish to be represented by the Union. Under settled Board law, however, cards signed under such circumstances should not be the basis of a decertification election at all, much less one that occurs before the ULPs that gave rise to that lack of confidence in the Union are remedied.

On February 22, 2017, the Hotel engaged in surveillance of union activity by having members of management insert themselves into the break room during the Union's visitation, in order to surveil the activity there. It also failed to provide the Union with requested information about bussers' schedules, time cards and payroll records—circumstances directly related to wages, hours, and working conditions.

Then, on March 2, 2017, the Hotel informed the Union that it wanted to change the union access status quo to bar the Union from having access to the worker cafeteria—the very place where employees take their breaks and would therefore be able to speak to their Union representatives. After a bargaining session devoted almost entirely to the issue, the Union followed up in writing that it did not want to negotiate about access in isolation, in part because it precludes the possibility of horse-trading *and* because the value of the Union's access rights under the prior contract's language would be lessened in significance once a new contract has been negotiated; for these, and other reasons, the Union wanted to negotiate an agreement.

The Union was forced to call off a subsequent negotiation session because of the Hotel's firing of Bill Rosario (which the Union separately contended was unlawful) and because of the traumatic impact this termination has had on the bargaining committee and bargaining unit members (many of whom had come into the meeting room to observe negotiations both in April and in August of 2017). The Union communicated in writing to the Hotel that it still hoped to bargain a successor agreement and, in pursuit of that end, made a written proposal regarding wages—one of the primary points of contention between the parties. The Hotel ***still*** has not responded in any meaningful way.

On November 21, 2017, the Hotel informed the Union that if the Union did not come back to the table for face-to-face bargaining, the Hotel would implement its access proposal effective January 1. The parties meet for bargaining on December 20, 2017. At the table, the Union made *five* proposals, one for *each one of the issues* regarding which the hotel claimed that the parties were previously at impasse. The Hotel failed to respond substantively to *any one of those proposals*. As Union representative David Glaser explained in his letter to the Hotel's representative, Bill Evans:

> …[R]egarding the hotel's access proposal, the Union provided you a counter-proposal that specifically addressed each and every justification and illustrative incident that the hotel had previously cited (in its August 4, 2017, across-the-table written communication) as being "the reason for" the hotel's proposal. In so doing, the Union was making the hotel a proposal far different from, and more management-friendly than, the language of the expired agreement, and a proposal that we believe clearly addresses all of the hotel's stated concerns.
>
> In response to all of this clearly significant movement in the Union's bargaining position, the hotel, after an approximately twenty-minute caucus away from the Union representatives, spoke very frankly through you. Regarding health care, housekeeping room attendants room limitations, and successorship, you had nothing to say: neither a counteroffer, nor any questions, nor any suggestion that the hotel would respond to any of these proposals with a meaningful counteroffer. Regarding access, you stated that the Union's proposal would not work for you, and that the hotel was not willing to alter the part of its access

> proposal that would bar Union representatives from being in the employee break room at any time. You were absolutely clear about this: the hotel will not yield on this point. Most startlingly, however, regarding wages, you stated that the hotel would simply be unable to respond with a counterproposal, because the hotel is unable to predict its future profitability in light of the Union's continuing boycott activity. Even when we pointed out that, by its very nature, that boycott activity can be expected to cease when a new contract is reached (and, the hotel is likely to insist upon that as a condition of reaching any new agreement), the hotel's response on this point did not change. Consistent with that statement, no economic counteroffer was forthcoming from the employer, even though, as noted above, we had made our wages proposal to the hotel on October 16, 2017, more than two months' earlier.
>
> When we discussed the overall situation between the parties further, **you reiterated that the hotel's sole desire is to implement its new access proposal**, and that **at no time since the hotel first communicated that proposal (March 2, 2017) has it had any desire to negotiate a successor agreement.** You were very clear that while you understand that *we*, the Union, wish to negotiate such an agreement, the hotel does not have any interest in doing so and does not believe that it has to, regardless of the Union's expressed desire to engage in such negotiations. Although Mr. Iglitzin explained to you that this is a misunderstanding of the relevant law, and that the hotel would have been obligated to sit down and bargain with the Union on these issues, at the Union's request, even if it (the hotel) had never presented its access proposal at all, you did not seem to accept what Mr. Iglitzin was saying, and the hotel's position did not change.

On January 5, 2018, the Hotel broke off negotiations, stating, through Mr. Evans, that "we are unwilling to change our considered positions in the absence of a respectful and good faith partner." It also declared its intent to implement its access proposal beginning January 15, 2018, which it subsequently did.

Setting aside the Hotel's rhetoric about withdrawn and refiled charges against the Hotel, *see* Request for Review at pg. 2, the Union has indeed been forced to file numerous ULPs due to the Employer's behavior—and has sought 10(j) relief as well—as outlined herein:

ULP Case No.	Description/Summary
19-CA-193656, 19-CA-193659	*Date Filed: February 22, 2017.* Surveillance, including management inserting themselves in break room to surveil union visits; failure to provide the Union with requested information about bussers' schedules, time cards

	and payroll records. Merit determination found by Region 19; settlement agreement entered.
19-CA-203675	*Date Filed: August 1, 2017.* Barring Union interns from accessing bargaining unit members on hotel property. Merit determination found by Region 19; settlement agreement pending.
19-CA-212923	*Date Filed: January 8, 2018.* Failing to provide information requested on August 22, 2017, pertaining to Hotel's claim that bargaining unit members complained to the General Manager about the Union, and further violation of the settlement agreement in Case Nos. 19-CA-193656 and 19-CA-193659. Merit determination found by Region 19; settlement agreement pending.
19-CA-212950	*Date Filed: January 10, 2018.* Failing/refusing to bargain in good faith for a successor CBA, including: failing to make counter-proposals, ceasing negotiations, refusing future bargaining, unilaterally implementing its restricted terms of access for the Union, and breaching the Settlement Agreement in Case Nos. 19-CA-193656 and 19-CA-193659. Merit determination found by Region 19; settlement agreement pending.
19-CA-215741	*Date Filed: March 1, 2018.* Termination of Bill Rosario in retaliation for his Union support and protected concerted activities. Investigation ongoing; pending determination from Region.
19-CA-218585, 19-CA-218613	*Date Filed: April 16, 2018.* Hotel filed a retaliatory, frivolous, and objectively baseless federally-preempted lawsuit in federal court against the Union, seeking to retaliate against the Union, its members, and employees represented by the Union for their efforts to engage in collective bargaining with the Employer, and to attain lawful access to the premises of the Hotel for representational purposes, and for their filing and pursuit of ULPs in support of those efforts. Investigation ongoing; pending determination from Region.
19-CA-216859	*Date Filed: March 16, 2018.* Retaliation against employee for engaging in her protected right to have her union intercede on her behalf with respect to hours and working conditions. Investigation ongoing; pending determination from Region.
19-CA-218647	*Date Filed: April 17, 2018.* The Hilton unlawfully sought to prevent and penalize Section 7-protected activity, and engaged in conduct inherently destructive of Section 7 rights, by contacting the Anchorage Police Department and seeking to enlist the police to assist it in preventing union agents from entering the hotel's premises in order to speak to union-represented hotel employees. Investigation ongoing; pending determination from Region.
19-CA-223089	*Date Filed: June 29, 2018.* Retaliation against employee for protected concerted activity. Investigation ongoing; pending determination from Region.
19-CA-225466	*Date Filed: August 9, 2018*. Unilateral change regarding how the Employer staffs banquet events in a manner that violates bargaining unit seniority. Investigation ongoing; pending determination from Region.

ARGUMENT

I. THE REGION WAS RIGHT TO POSTPONE PROCESSING THE DECERTIFICATION PETITION HERE, WHERE THERE IS EXTENSIVE EVIDENCE OF EMPLOYER INTERFERENCE WITH THE UNION'S REPRESENTATION OF ITS EMPLOYEES, WHERE THERE ARE CURRENTLY ULP CHARGES PENDING, AND WHERE THE EMPLOYER HAS REPEATEDLY VIOLATED SETTLEMENT AGREEMENTS.

The pending ULP charges against the Hotel are sufficient to justify the Region's decision here. A petition is not "unblocked" until the charge is dismissed.

The Hotel relies heavily on *Truserv Corp*., 349 NLRB 227 (2007), which is not applicable to the circumstances here. The Board noted that after a ULP has been settled, "the decertification petition *can* be processed and an election *can* be held" when "the employer conduct in question is only alleged to be unlawful, and thus there is no basis on which to dismiss the petition." *Id*. (emphasis added). When the Board goes on to note the circumstances under which a decertification petition may *not* be processed—citing the Acting Regional Director's decision to *dismiss* the decertification petition based on settled ULPs—it was clearly describing circumstances where a Region has blocked said petition *indefinitely*:

> if (a) the execution of the settlement of the unfair labor practice charge comes before the filing of the petition; (b) the Regional Director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer; or (c) the settlement of the unfair labor practice charge includes an agreement by the decertification petitioner to withdraw the petition.

Here, the Region has made no permanent determination to dismiss the petition sufficient for their reliance upon *Truserv*—and the Hotel's "concerns" are thus premature.

But regardless of a causal relationship or lack thereof, unfair labor practices that interfere with the laboratory conditions of the election should continue to block the processing of the

petition—and the Region is right to consider those ULPs when determining that a decertification petition should be temporarily put on hold—or even dismissed permanently.

For example, in *Albertson's, Inc.*, 323 NLRB 1 (1997), the Board upheld the Administrative Law Judge who found that Albertson's had violated Section 8(a)(1) of the Act by assisting employees in filing a decertification petition. The Region had also dismissed the pending decertification petition, looking at multiple ULPs—including settled ULPs outside the immediate case—in deciding to do so, The employer appealed, and the Tenth Circuit upheld the Board's decision in *Albertson's, Inc. v. NLRB*, 161 F.3d 1231 (10th Cir. 1998), holding that the Board could properly rely on earlier settled ULPs (involving an earlier incident in which an employee was allegedly threatened and retaliated against for engaging in pro-union activities on work time), when deciding to dismiss the petition.

The Court further stated that such a decision to *permanently* dismiss the petition was not as dire as the employer portrayed it to be:

> Because we uphold the Board's finding of unfair labor practices, we are not in a position to "unblock" the decertification election if, in fact, it was blocked. … The NLRB's decision whether to hold an election based on the decertification petition is discretionary. Even so, we suggest that any harm to employees seeking decertification resulting from the blocking of the petition is slight in that employees **are free to file a new petition so long as it is circulated and signed in an environment free of unfair labor practices**.

Albertson's, Inc, 161 F.3d at 1239.

Here, the Region rightly reviewed the incredibly problematic behavior by the Hotel, over the course of repeated violations of the Act, in determining that decertification proceedings needed to be postponed (not even permanently, at this time). This behavior includes surveillance in the break room to specifically surveil union visits; failure to provide the Union with requested information about bussers' schedules, time cards and payroll records; barring Union interns from

accessing bargaining unit members on hotel property; failing to provide information requested pertaining to the Hotel's claim that bargaining unit members complained to the General Manager about the Union; and failing/refusing to bargain in good faith for a successor CBA, including: failing to make counter-proposals, ceasing negotiations, refusing future bargaining, and unilaterally implementing its restricted terms of access for the Union—just to name a few. Those are just the cases that have been *settled* after the Region found merit.

Then there are the pending ULPs involving retaliatory termination and other bad actions by the Hotel that have yet to be settled, or have a merit determination reached by the Region. These include the termination of Bill Rosario in retaliation for his Union support and protected concerted activities (with 10(j) relief requested); the Hotel's filing of a frivolous and objectively baseless federally-preempted lawsuit in federal court against the Union; retaliation against employees for engaging in their protected right to have their union intercede on their behalf with respect to hours and working conditions; and the Hotel unlawfully seeking to prevent and penalize Section 7-protected activity, and engaged in conduct inherently destructive of Section 7 rights, by contacting the Anchorage Police Department and seeking to enlist the police to assist it in preventing union agents from entering the hotel's premises in order to speak to union-represented hotel employees.

The Region has also found merit to allegations of the Hotel violating previous settlement agreements reached with the Region (in Case Nos. 19-CA-212923 and 19-CA-212950 for Case Nos. 19-CA-193656 and 19-CA-193659).

Here, there is such ample evidence to warrant postponement of the decertification process that the Hotel's assertions to the contrary are laughable.

II. THE REGION WAS RIGHT TO BLOCK THE DECERTIFICATION PETITION HERE, WHERE THE HOTEL'S PERVASIVELY BAD CONDUCT HAS UNDOUBTEDLY TAINTED THE BARGAINING RELATIONSHIP—AND THEREFORE TAINTED THE VALIDITY OF THE PETITION ITSELF.

To taint a petition, unfair labor practices "must be of a character as to either affect the Union's status, cause employee dissatisfaction, or improperly affect the bargaining relationship itself." *Master Slack Corp*., 271 NLRB 78, 84 (1984). To determine whether such a relationship exists between the unlawful conduct and the petition, the Board applies the following factors: (1) the length of time between the ULPs and the petition, (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees, (3) any possible tendency to cause employee dissatisfaction with the union, and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Id.*

There are some exceptions to the causal relationship requirement portion of the standard. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, the causal relationship between unlawful act and subsequent loss of majority support may be presumed. *Lee Lumber & Bldg. Material Corp*., 322 NLRB 175, 177 (N.L.R.B. 1996), *aff'd in part, remanded in part on other grounds sub nom. Lee Lumber & Bldg. Material Corp. v. N.L.R.B.*, 117 F.3d 1454 (D.C. Cir. 1997).

Here, the Hotel has clearly engaged in unlawful acts that have had detrimental and lasting effects on employees, have caused employee dissatisfaction with the Union, and that has affected employee morale. Even despite that, the Hotel's behavior is sufficient on its own to draw the conclusion that there is a relationship between its actions and the decertification petition itself. While this is most likely sufficient to have the petition be dismissed permanently, it is certainly sufficient to warrant it being postponed while the additional pending ULPs are sorted out.

The Hilton has asserted, in its briefing in support of its Request here, that it has *not* violated the Act in a manner warranting the Region's actions here, and that its behavior has not somehow coercively impacted the conditions of the Union's representation of its members. Such an assertion is unsupported by the facts or by the law. The Union will address each of the ULPs that are pending or that have recently occurred that are sufficient to warrant the Region's decision here.

A. THE HOTEL HAS FAILED TO ENGAGE IN GOOD-FAITH BARGAINING.

It is well established that under the Act, an employer cannot make a unilateral change in mandatory subjects of bargaining, which are the subject of current collective bargaining efforts. *NLRB v. Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107 (1962). In *Katz*, the Supreme Court first stated that "an employer's unilateral change in conditions of employment under negotiation is … a violation of § 8(a)(5) [of the NLRA], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." In fact, "[u]nilateral action by an employer" before the employer has met its bargaining obligation "must of necessity obstruct bargaining." *Id*. at 747.

In Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co, 484 U.S. 539, 108 S.Ct. 830 (1988), the Supreme Court explained why unbargained-for unilateral changes in conditions of employment "must of necessity obstruct bargaining," stating:

> Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.

Id. at 544, n. 6 (quoting from *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co*., 779 F.2d 497, 500 (9th Cir. 1985).

Where "an employer insist[s] on separating bargaining on its proposals" and "remain[s] firm that certain matters would not be included in contract negations," thereby precluding the Union from general negotiations on a collective-bargaining agreement and any "attempts to 'horse trade' on contract proposals," it violates its obligation to bargain in good faith under the Act. *Du Pont Spruance*, 304 NLRB 792 (1991).

The Hilton's absolute refusal to bargain any and all economic or non-economic terms of a successor agreement other than the one it wants to bargain about—access—is a clear failure to bargain under Section 8(a)(5).

B. THE HOTEL UNILATERALLY IMPLEMENTED ITS ACCESS PROPOSAL WITHOUT OVERALL IMPASSE HAVING BEEN REACHED.

It is axiomatic that "when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Hotel Bel-Air*, 358 NLRB No. 152 (2012); *Visiting Nurse Services of Western Mass., Inc*., 325 NLRB No. 212 (1998), *enf'd*, 177 F.3d 52 (1st Cir. 1999); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enf'd*, 15 F.3d 1087 (10th Cir. 1994). A unilateral change to a mandatory subject of bargaining when the parties are not at impasse violates Sections 8(a)(5) and (1) of the Act if the change is "material, substantial, and significant." *Barstow Community Hospital*, 361 NLRB No. 34 at 2 (2014) (*quoting Flambeau Airmold Corp*., 334 NLRB 165, 165 (2001), modified on other grounds 337 NLRB 1025 (2002)); *see also Hotel Bel-Air*, 358 NLRB No. 152; *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). "Where…parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes in terms and conditions of employment 'extends beyond the mere duty to provide notice and an opportunity to bargain about a particular

subject matter; **rather it encompasses a duty to refrain from implementation at all**, absent overall impasse on bargaining for the agreement as a whole.'" *Guard Publishing Co., d/b/a The Register-Guard*, 339 NLRB 353 (2003) (emphasis added).

Impasse is reached when neither party is willing to depart from their respective positions. *See Dust-Tex Service, Inc*. 214 NLRB 398, 405 (1974) ("A genuine impasse in negotiations is one where despite the parties' best efforts to achieve an agreement, neither party is willing to move from its respective position"); *Hi-Way Billboards, Inc*., 206 NLRB 22 (1973) ("A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position."). For impasse to be reached, "[B]oth parties must believe that they are at the end of their rope." *Hotel Bel-Air*, 358 NLRB No. 152 at 7. This must be a contemporaneous understanding by both sides. *Oak Hill*, 360 NLRB No. 55 at 49 (2014).

Furthermore, where a party makes significant movement in its bargaining position, even where it expects compromise from the other side, such movement is sufficient to preclude a finding of impasse. *See Mike-Sell's Potato Chip Co*., 360 NLRB No. 28 at 10 (no impasse where Union already made significant concessions indicating a willingness to compromise further but was unwilling to capitulate immediately to the other party's unchanged terms; where Union opened the door to possible compromises on other issues, employer unlawfully declared impasse four days later).

Where, as here, the Union has communicated its willingness to further compromise, and it supported statements to that effect with actual compromise through its proposals on the five subjects of contention, the Hotel's pronouncement of impasse was simply empty and premature.

See, e.g., The Grosvenor Resort, 336 NLRB 613, 616 (2001) (declaration of impasse while there was still flexibility in parties' bargaining positions was premature); *Wycoff Steel, Inc.*, 303 NLRB 517, 523 (1991) (Respondent's self-serving view that impasse had been reached is not determinative).

Impasse simply did *not* exist, as the Union made significant concessions and counterproposals in bargaining that the Hotel refused to acknowledge—and that the Hotel has not responded to, to date. There was no impasse sufficient to justify the Hotel's unilateral implementation of its changed terms of access.

C. ANY PRIOR IMPASSE THAT MAY HAVE EXISTED HAS CLEARLY BEEN BROKEN, RENEWING THE HOTEL'S DUTY TO ENGAGE IN GOOD-FAITH BARGAINING.

A good-faith impasse in negotiations only temporarily suspends the duty to bargain. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412, 102 S.Ct. 720, 725, (1982) ("As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force" and "impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'"). When impasse is reached, "the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973); *see also Civic Motor Inns*, 300 NLRB 774, 775 (1990) (To break impasse, the Board required there be an "intervening event ... that would be likely to affect the existing impasse or the climate of bargaining.").

Impasse is considered broken when there is "substantial evidence in the record that establishes changed circumstances sufficient to suggest that future bargaining would be fruitful." *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C.Cir.1996). The burden is on the party asserting that the impasse has been broken to show that there are changed circumstances to justify this determination. *See Hi-Way Billboards Inc*., 206 NLRB 22, 23 (1973); *Pepsi-Cola-Dr. Pepper Bottling Co*., 219 NLRB 1200 (1975). The concessions or changes must not be "trivial or picayune" concessions. *NLRB v. Webb Furniture*, 366 F.2d 314 (4th Cir. 1966). In *Webb*, a Union was found to have broken impasse through a letter in which it offered to make some modest concessions, even though it refused to compromise on the main issue over which the parties were at loggerheads. *Id*. at 315. Because the concessions were not trivial or meaningless, it was for the Board to decide if they were "of such substantiality as to relieve the impasse and to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions." *Id*.

Here, it was not the Hotel's access proposal, but the Union's substantial movement on *all* of the key issues, that means that the parties were no longer at "overall impasse" at the time the employer unilaterally implemented its proposal. Certainly an employer does not establish overall impasse simply by its own adamant refusal to bargain about anything but the one issue it cares about. The Hotel's behavior here has clearly and unequivocally violated the Act.

D. THE HOTEL'S OBJECTIVELY COERCIVE BEHAVIOR WITH RESPECT TO TERMINATION OF UNION SUPPORTERS IS SUFFICIENT TO WARRANT A DELAY IN PROCESSING THE DECERTIFICATION PETITION ON ITS OWN, IF NOT OUTRIGHT DISMISSAL.

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of discouraging membership in a labor organization. In general, the Act makes it

illegal for an employer to discriminate in employment because of an employee's union or other group activity within the protection of the Act. A banding together of employees, even in the absence of a formal organization, may constitute a labor organization for purposes of Section 8(a)(3). Discrimination within the meaning of the Act would include such action as discharging, demoting, or assigning employees to a less desirable shift or job. An employer violates *both* Section 8(a)(1) and 8(a)(3) of the Act when it terminates employees in retaliation for their union activities.

"Establishing the prima facie case …consists of showing that the employer engaged in 'discriminatory conduct which could have adversely affected employee rights to some extent.'" *Jorgensen's Inn v. Bartenders, Culinary Workers & Motel Employees Union Local 158*, 227 NLRB 1500, 1513-14 (NLRB 1977) (internal citations omitted). "An important element in showing discrimination is the presentation of direct or circumstantial evidence that the employer had knowledge of union activity and the particular employee's involvement therein and that the employer's consideration of such activity was a factor which prompted, caused, or motivated the alleged discriminatory conduct...." *Id.*

Here, arguably one of the most active, vocal union advocates in the bargaining unit, Bill Rosario, was terminated from his employment with the Hotel after taking pictures related to safety concerns and providing them to his Union. The Hotel's justifications for its actions here are purely pretextual and should be ignored outright. For example, all maintenance employee reports are submitted *verbally* to the maintenance supervisor, which is exactly what the employee did in this case before informing his Union of the pervasive mold growth he was told to cover up. Despite begrudgingly acknowledging the maintenance supervisor's memory issues, the Hotel still insisted that the employee failed to report anything to anyone in management—which

is pointedly false, as Mr. Rosario reported it to *two* supervisors. Furthermore, Mr. Rosario did not violate any policy concerning expectations or procedures for employee reports about mold, or any such work rule.[2]

Furthermore, before even being informed by the Union about Mr. Rosario's termination or the purported reasons for it (failure to report mold to management), bargaining unit members approached Union representatives and stated that they were told by management that Mr. Rosario was terminated for taking pictures and sharing them with the Union.[3] That narrative did *not* come from the Union. In *GFC Crane Consultants, Inc*., 352 NLRB 1236 (2008), the Board found that the employer's stated reasons for laying off union-supporting employees were pretextual based on the employer's justifications for laying off employees being inconsistent with the conditions on the ground.

Even the *timing* of the Hilton's actions is suspect. Management has known about the existence of the pictures for quite some time. Given the proximity in time to the parties' return to bargaining, as well as Mr. Rosario's participation with the Union in seeking an Ordinance passed by Anchorage Assembly addressing the mold issue—the Hilton's actions here are inherently suspect.

It should also not be dispositive that other employees who participated in protected, concerted activity with Mr. Rosario were *not* terminated. "An unfair labor practice is not

[2] Nor would such a rule prohibiting his behavior here be valid. It would be a violation of Section 8(a)(1) to prohibit employees from taking photos or videos because "employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protected conduct may include, for example, … documenting unsafe workplace equipment or hazardous working conditions[.]" *Caesars Entm't*, 362 NLRB No. 190 (2015).

[3] Nor can Mr. Rosario's conduct of taking pictures be considered sufficiently egregious to remove it from the protection of the Act. *White Oak Manor*, 353 NLRB 795, 798–801 (2009), *review granted, cause remanded sub nom. White Oak Manor v. NLRB*, 2010 WL 4227419 (D.C. Cir. 2010) (employee was fired for taking photos of coworkers in order to document the Employer's inconsistent enforcement of work rules; the Board found that the discharge violated the Act because the employee was engaging in protected activity by taking photos in order to show them to the union in an effort to improve working conditions).

excused by an employer's failure to go the whole [nine] yards and disciplining everyone who engaged in statutorily protected activity." See discussion and citations, *Handicabs, Inc*., 318 NLRB 890, 897-898 (1995). Instead, it exists when an employer seems to be seeking to accomplish a purpose unlawful under the Act: "making an example of" an employee, *NLRB v. Shedd-Brown Mfg. Co*., 213 F.2d 163, 175 (7th Cir. 1954), both as a retaliatory matter and, also, to achieve an "*in terrorem* effect on others," *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971).

To the best of the Union's knowledge, there has never been an employee summarily terminated in this manner before—and certainly not one where management attempted to march the employee *through the middle of the lobby*, escorted by the top two members of management, in plain view of all employees. This was clearly intended to send a message to intimidate bargaining unit members.

The Hotel's actions *have* already begun deterring union activity, as Local 878's organizers can readily attest to. Several of Mr. Rosario's former coworkers have indicated to the Union that they are very concerned that participating in union activities will lead to their termination. Rumors that employees can be fired for taking pictures for the Union are running rampant at the Hilton. Ultimately, reasonable employees would likely conclude that they must choose between their job and banding together to hold the employer accountable for unsafe and unhealthy working conditions due to the rampant mold problem at the hotel. The Hotel's actions interfered, coerced, and retaliated against employees in the exercise of their fundamental right to join and assist a labor organization, therefore violating the Act.

E. THE HOTEL'S DECISION TO SOLICIT POLICE INTERVENTION IS ALSO INHERENTLY COERCIVE.

Clear Board law states that the mere *threat* of calling police to respond to lawful union

activity is unlawful and coercive. *Roadway Package Sys., Inc.*, 302 NLRB 961 (1991), citing *All American Gourmet*, 292 NLRB 1111 (1989).

On January 5, 2018, and via a subsequent e-mail sent on January 12, the Hotel informed the Union that it would no longer permit Union representatives to have access to the lunchroom—in light of in excess of ten years of unbroken access. The Union immediately filed its ULP, asserting that this decision by the hotel violates federal law.

Despite this, the Hotel sought the intervention of the Anchorage Police Department, to remove Union representatives from the Hotel. The Anchorage Police Department, after receiving a preemptive admonition from the Union's counsel, declined to intervene. However, the Hotel has failed to inform the Board here of what *actually* occurred before the Police made the decision to stay out of the parties' dispute.

The Police were sent to the Union hall and told Union representatives they were trespassing on the Hilton property, that the Hilton's representatives had informed the Police that the Union had been warned against trespassing, providing the Police *only* with a letter from their General Manager, and *not* informing the Police about the Union's response. Finally, the Hotel demanded that the Police provide the Union with a letter reminding them not to appear on the Hotel's premises.

Just because the Police Department acknowledged that it should *not* intervene does not mean the employer did not try to have the Police arrest Union representatives. In fact, clear Board law states that the mere *threat* of calling police is unlawful and coercive. *Roadway Package Sys., Inc.*, 302 NLRB 961 (1991), citing *All American Gourmet*, 292 NLRB 1111 (1989). In other words, the mere act of sending Police to the Union hall to inform the Union that

it was not welcome on the Hotel's property, and that Union representatives would be arrested if they appeared, is coercive in nature.

F. THE HOTEL'S ARGUMENT SUPPORTING ITS PREEMPTED AND RETALIATORY LAWSUIT IS NONSENSICAL AND SHOULD BE DISREGARDED.

The Hotel appears to support its frivolous and retaliatory lawsuit that is the current subject of another ULP filed by the Union by stating that another UNITE HERE local in another state did something similar to what they allege in the lawsuit. *See* Page 12. This argument is too nonsensical to address in depth, but the Union's ULP related to the retaliatory, frivolous, and baseless federally-preempted lawsuit filed by the Hotel against the Union is a valid one that is also sufficient to block the petition.

In *Bill Johnson's Restaurant v. N.L.R.B.*, 461 U.S. 731 (1983), the Court held that it is an unfair labor practice to "to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of" Section 7 rights. *Id*. at 744. When an employer's lawsuit is preempted, its filing and/or prosecution constitutes an unfair labor practice as long as it "tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights," *In re Webco Indus., Inc*., 337 NLRB 361, 363 (2001) (*citing Manno Elec*., 321 NLRB 278, 298 (1996))—in other words, when it is "unlawful under traditional NLRA principles." *Fed. Sec., Inc*., 359 NLRB 1, 13 (2012) ("Federal Security II"); *Stroehmann Bakeries, Inc*., 320 NLRB 133, 138 (1995). Since "footnote 5 of *Bill Johnson's* places preempted lawsuits outside of the First Amendment analysis," once preemption is found, "the Board may hold that the filing and maintenance of the lawsuit is an unfair labor practice without regard to whether it is objectively baseless [or retaliatory]." J*.A. Croson Co*., 359 NLRB 19, 26 (2012) (citation omitted).

Moreover, following attempts to challenge this doctrine in the wake of the Supreme Court's decision in *BE & K Construction Co. v. N.L.R.B.*, 536 U.S. 516 (2002), the Board reiterated that "a preempted lawsuit enjoys no special protection under the First Amendment." *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, at *6 (2018); *J.A. Croson*, 359 NLRB at 25; *see also Can-Am Plumbing, Inc. v. N.L.R.B.*, 321 F.3d 145, 166 (D.C. Cir. 2003) ("*BE & K* did not affect the footnote 5 exemption in *Bill Johnson's*"); *Small v. Operative Plasterers' and Cement Masons' International Ass'n Local 200*, 611 F.3d 483, 492 (9th Cir. 2010) (quoting *Can-Am Plumbing*).

The Board has held that an employer's initiation of a lawsuit seeking damages against a union for its members' lawful deployment of economic weapons tends to deter protected concerted activity. *Ashford*, *supra* at *7-8 (where "consumer boycott of the hotel was protected by Section 7," claims in federal district court lawsuit for common law defamation and tortious interference with contractual and prospective relations "plainly had a tendency to interfere with conduct that is protected by Section 7 (the [u]nion's consumer boycott)," and as a result, employer "violated Section 8(a)(1) of the Act by filing and maintaining them"). This conclusion follows naturally from the traditional NLRA principle that an employer interferes with, coerces, and restrains Section 7 rights when it threatens to, or does, discipline employees for utilizing permissible economic weapons such as primary strikes or boycotts. *See, e.g., In re Iowa Packing Co.*, 338 NLRB 1140, 1143 (2003) ("by maintaining and widely publishing broad work stoppage ban, punishable by discharge, an employer interferes with the free exercise of Section 7 rights"); *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977) ("for an employer to terminate employees who concertedly go on strike…interferes with the employees' Section 7 rights"); *Automotive Armature Co.*, 256 NLRB 270, 276 (1981) (employer's discharge of employee "was an

interference with, coercion against, and a restraint upon the exercise of employees[’] protected Section 7 rights (to suggest or in fact strike)”); *Coors Container Co.*, 238 NLRB 1312, 1319 (1978), enf’d 628 F.2d 1283 (1980) (employer violated Section 8(a)(1) when it demanded employees remove boycott sign).

Obviously, an employer may not accomplish by misuse of the judicial process what it is prohibited from doing through self-help—which is exactly what has occurred here: the Hotel has filed a baseless lawsuit decrying the Union’s lawful efforts to get the Hotel to bargain with it in good faith. The Hotel’s arguments to the contrary must also be dismissed.

CONCLUSION

For the foregoing reasons, the Union hereby asks the Board to deny the Hotel’s Request for Review, and grant deference to the Region’s accurate observation that the Hotel’s behavior warrants a postponement of processing of the decertification petition at issue here.

DATED this 27th day of August, 2018.

Laura Ewan, WSBA No. 45201
Schwerin Campbell Barnard Iglitzin & Lavitt, LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
(206) 257-6012
ewan@workerlaw.com

Attorneys for UNITE HERE! Local 878

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the United States of America that on this 27th day of August, 2018, I caused the foregoing to be electronically filed with the Executive Secretary of the National Labor Relations Board, and a true and correct copy of the same to be served via email on the following:

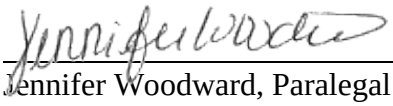
Regional Director Ronald Hooks
Ronald.hooks@nlrb.gov

Douglas Parker
dparker@littler.com

And a true and correct copy of the same to be placed in the US First Class mail, addressed to:

Patrick White
6701 E 6th Ave
Anchorage, AK 99504

Signed in Seattle, Washington this 27th day of August, 2018.



Jennifer Woodward, Paralegal